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No. 681

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939

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RAILROAD COMMISSION OF TEXAS, ET AL.,  
Petitioners

VS.

ROWAN & NICHOLS OIL COMPANY,  
Respondent

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PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

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The Attorney General of the State of Texas, on behalf of the Railroad Commission of Texas and Lon A. Smith, Ernest O. Thompson and Jerry Sadler, Members of the Railroad Commission, and himself, Gerald C. Mann, Attorney General of Texas, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on November 3, 1939, affirming the judgment of the United States District Court for the Western District of Texas.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas (R. 64) is re-

ported in 28 F. Supp. 131. The opinion of the Circuit Court of Appeals (R. ~~1006~~) is reported in 107 F. (2d) 70. 1005

## JURISDICTION

The judgment to be reviewed was entered on November 3, 1939 (R. ~~1013~~). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347).

## QUESTIONS PRESENTED

1. Whether the proration orders of the Railroad Commission of Texas controlling the production of oil in the East Texas field are unreasonable, arbitrary and confiscatory of the property of respondent, Rowan & Nichols Oil Company, and deprive it of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, by giving weight to other physical and engineering factors than solely the ratio that the oil reserves of the respondent's lease bear to the total oil reserves in the field.
2. Whether the order of the United States District Court, affirmed by the Circuit Court of Appeals, that the Railroad Commission of Texas must allocate daily allowable production to the lease of the respondent at the same ratio to the total daily allowable for the East Texas field as the estimated recoverable oil in that lease bears to the estimated

recoverable oil in the entire East Texas field, to the exclusion of all other relevant physical and engineering factors (such as drainage or migration of oil from the west side to the east side of the field as it is produced, the potential of individual wells, the equitable use and dissipation of the total reservoir energy of the field, minimum well allowables, and relative times for production) itself is unreasonable, arbitrary and confiscatory of the property of the many correlative property owners in the field who would be deprived both of the oil beneath their lands and of the opportunity to produce that oil because of the preferential position in which the respondent is placed by this court order.

3. Whether the order of the District Court of the Western District of Texas, affirmed by the Circuit Court of Appeals for the Fifth Circuit, in effect is not contrary to the rule of property in oil laid down by the Supreme Court of the State of Texas, that ownership is of oil in place.

4. Whether the respondent, Rowan & Nichols Oil Company, discharged the burden of proving the illegality of the proration orders of the Railroad Commission of Texas, attacked in this case.

5. Whether the respondent, whose lease is more densely drilled, and has produced and is allowed to produce more oil per acre than the average of the East Texas field under the orders of the Railroad Commission is entitled to attack said orders on the ground that other producers or operators are al-

legedly receiving a relatively larger proportion of the daily allowable production from the whole field than respondent is receiving.

6. Whether the respondent, having made no attacks on the validity of the Railroad Commission's orders for over five years, during which time approximately 17,000 wells have been drilled in the East Texas field in reliance on the validity of the orders of the Railroad Commission and during which time the orders of the Railroad Commission have remained substantially unchanged, is estopped to attack the validity of the proration orders.

### THE FACTS

This suit was brought by the respondent, Rowan & Nichols Oil Company, against the petitioners, the Railroad Commission of Texas and its members and the Attorney General of Texas, seeking injunctive relief against the enforcement of the proration orders for the East Texas field on the ground that the orders deprived respondent of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States in that they denied to respondent an "equal opportunity with other owners in the East Texas field to recover that portion of the oil to which it is entitled" (R. 10). The petitioners in their answer denied that the orders of the Railroad Commission of Texas were arbitrary or discriminatory, and al-

leged that such orders were necessary for the conservation of oil and gas and that the respondent, under the orders of the Railroad Commission of Texas was receiving and would receive in the future its fair share of the recoverable oil in the East Texas field (R. 48). A prayer for an interlocutory injunction was abandoned and the cause was tried on the prayer for a permanent injunction.

The respondent conceded (1) the validity of the statutes authorizing the Railroad Commission to regulate the production of oil and gas "in a reasonable manner" (R. 13); (2) the validity of the total allowable amount of daily production fixed by the Railroad Commission (R. 130, 601); (3) the validity of the spacing and drilling regulations promulgated by the Railroad Commission (R. 4, 21); (4) the legality of all the wells drilled under such regulations (R. 4); (5) the necessity of setting some minimum allowable for each well in the field (R. 328, 633, 638). Despite having conceded that the valid total allowable set for the field must be equitably divided among all the wells in the field with some minimum daily allowable per well to be set at the discretion of the Railroad Commission in the light of the facts adduced at regular administrative hearings, the respondent attacked the method whereby the total allowable production is allocated among the wells in the field drilled in accordance with spacing regulations upon the basis of the potential productive capacity of each well, with a minimum allowable of twenty barrels per

well per day below which no well capable of producing that amount is restricted.<sup>1</sup> The respondent prayed that its allowables be set currently solely in accordance with the ratio that its estimated oil reserves bear to the total estimated reserves for the field. (R. 7, 10, 647).

The method of proration here attacked is bottomed on the known facts concerning the physical factors existing in the East Texas field. The East Texas oil field is a vast body of oil located in the pore spaces in the eastern extremity of the Woodbine sand formation. In cross-section, from west to east, the field is roughly triangular in shape. The top, or long side of the triangle, running upward from west to east, is formed by the Austin chalk formation, which is impermeable and confines the

<sup>1</sup> The parties stipulated with reference to the method of proration as follows: (R. 995):

"1. The total daily allowable for the East Texas Field as fixed by the Railroad Commission order in force at the time of trial was about 522,500-barrels of oil.

"2. The order promulgated by the Railroad Commission and in force at the time of trial for the proration of this field allowable among the wells in the field provided: 'the owner or operator or manager of each well in the East Texas Field shall be permitted, either collectively or individually, to produce daily from each well a maximum of two and thirty-two hundredths (2.32) per cent of its hourly potential capacity as determined by the Commission.'

"3. In the application and enforcement of the above proration order (a) each well that could not produce as much as 20-barrels of oil per day was allowed to produce the maximum amount that it could produce; (b) where 2.32% of the hourly potential of any well would amount to less than 20-barrels per day, the well was allowed to produce 20-barrels of oil per day; (c) where 2.32% of the hourly potential of any well would amount to more than 20-barrels of oil per day, such well was allowed to produce 2.32% of its hourly potential.

"This application of the order resulted in the following: Approximately 451-wells, not any one of which was capable of producing as much as 20-barrels per day, were allowed to produce daily a total of approximately 5,250-barrels. Approximately 19,032-wells whose individual hourly potential when multiplied by 2.32% amount-

oil in the reservoir at the top. The bottom of the triangle, running approximately horizontally from the western edge of the field to about the middle of the field, is formed by the line of contact of the water in the Woodbine sand with the oil. The third side of the triangle is the Georgetown limestone formation, which begins at the water-oil contact line at about the middle of the field, and extends upward in an easterly direction to the point where it meets the Austin chalk.

The fact that the oil reservoir is triangular in cross-section means that the amount of oil underlying any particular lease depends on its location in the field. The thinnest sections of the field are in the western and eastern edges. From each edge,

ed to less than 20-barrels, were each allowed to produce a full 20-barrels per day; or from all of such wells a total of approximately 380,640-barrels per day. These were wells whose hourly potential ranged anywhere from 1-barrel to 860-barrels per hour. Approximately 6,325-wells whose individual potential when multiplied by 2.32% amounted to more than 20-barrels were each allowed to produce daily that number of barrels which equaled the product of its hourly potential multiplied by 2.32%. The total daily production from these wells was approximately 136,610-barrels. These wells had an hourly potential ranging from 865-barrels per hour to about 1,100-barrels per hour. In practical operation, the daily allowable of no well was controlled by the factor 2.32% of its hourly potential unless such well had a potential of 865-barrels or more per hour.

"The Plaintiff offered testimony to show that if each well in the field that could not make 20-barrels per day was allowed to produce the maximum which it was capable of producing, and if every well in the field that was capable of making 20-barrels per day was allowed to produce 20-barrels per day, that the aggregate of such production amounted to some 510,000 or 515,000-barrels of the daily allowable of approximately 522-500-barrels, with the result that only about 7,000 to 12,000-barrels of the total daily production was in the practical application of the order of the Commission prorated on the factor of 2.32% of the hourly potential of the wells.

"4. The testimony shows that the wells were shutdown on Saturdays and Sundays and were allowed to produce only five (5) days each week and the figures referred to in the testimony were for the days on which the wells were allowed to produce."

the oil sand gradually becomes thicker and reaches its maximum thickness of about one hundred feet at about the center of the field.

The amount of recoverable oil beneath any lease is not necessarily in exact proportion to the average thickness of the oil-saturated sand. The sand varies in certain physical characteristics, which affect the amount and the recoverability of the oil, such as the porosity and permeability of the sand, the size and location of impermeable streaks of volcanic ash and shale, and the amount of connate water. The percentage of oil recovered will also depend on the bottom hole pressure, which in turn depends on the location of the lease on the structure.

Almost all of the pressure in the East Texas field is furnished by the water drive, or the pressure of the water on the oil. The pressure arises from the fact that the surface outcrops of the Woodbine sand are about 3600 feet higher than the oil reservoir in the East Texas field, and the entire Woodbine sand (except where it contains oil or gas) is saturated with water. As the oil is withdrawn from the reservoir, the water on the western edge pushes in to take its place. As the water advances, it pushes oil ahead of it. The lowest portions of the field, being on the western side of the field, naturally will be drowned out by water first, and the highest portions of the field, in the center and on the east side, will be drowned out last. In the center and on the eastern side where the water has not yet encroached, when oil is withdrawn other oil is pushed in to take

its place, provided the sand is sufficiently permeable to permit the passage of the oil. In a large section in the center and on the eastern side of the field, including the respondent's Todd "B" lease, there is still as much oil in place beneath the surface as there was when the field was discovered, although oil has been produced for over eight years. The eastward migration of oil is, therefore, an important physical factor which affects the amount of oil which will be produced from any property in the East Texas field under any method of proration.

The respondent is the owner of a lease in the East Texas field known as its Todd "B" lease, containing 24.99 acres upon which it has drilled five wells. The respondent's lease is located in the "fairway," or portion of the field where the sands are thickest and most permeable, and east of the center of the field. It is situated in a portion of the field where the top of the Woodbine sand is very high and where no water has yet encroached, although it has produced over 355,000 barrels of oil up to the date of the trial (R. 675). The oil which has been withdrawn has been replaced by other oil, which was drained to respondent's lease from other leases to the west, north and south of respondent's lease. Due to this drainage, the respondent's lease still has in place beneath it substantially the same amount of oil as was originally in place beneath such lease. It has suffered no loss; on the contrary, it has made a net gain by drainage of an amount substantially equal to the amount of oil which has been

produced from its lease. The respondent's lease will produce many years after the leases with thinner sands have gone out of production. As the leases with thinner sands go out of production, the share of the total allowable assigned to respondent's wells will progressively increase. (R. 302, 396, 571).

The specific order attacked was the order of August 29, 1938, and it was agreed that the suit should cover subsequent orders continuing the same method of proration. (R. 666, 667). Under the order of August 29, 1938, the daily allowable production of the wells on the respondent's Todd "B" lease was slightly more than 22 barrels per well, or a total for the lease of 111.83 barrels. (R. 675). The District Court, finding for the respondent (R. 64), entered its order (R. 76) enjoining the enforcement of the proration orders of the Railroad Commission, as applied to respondent's property, and setting up the method of proration to be followed whereby the Railroad Commission is required to fix the amount of the allowable production for the Todd "B" lease at "that amount of oil which bears to the daily field allowable fixed by the Railroad Commission the ratio which 220 barrels bears to 522,000 barrels" (R. 78).<sup>2</sup> The District Court thus laid down the legal principle that proration must be based solely upon the ratio of the estimated oil reserves in a lease to the estimated oil reserves for

<sup>2</sup> The Court determined that based upon estimated yields of both the Todd "B" lease and the entire field that when the total daily allowable for the field was 522,000 barrels, as found in the Commission Order of August 29, 1938, then the proper allowable, under its theory, for the Todd "B" lease was 220 barrels. (R. 977)

an entire field without regard to compensating equitable factors designed to assure such a result over the life of a field. The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court but amended the judgment of the District Court so as to read "without prejudice to the right of the Commission to enter a reasonable proration order and to fairly enforce it." (R. ~~1012, 1013~~).

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### SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In holding that the proration orders of the Railroad Commission are unreasonable, arbitrary and confiscatory of the property of the respondent, and deprived it of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

(2) In holding that the proration orders of the Railroad Commission are unreasonable, arbitrary, and confiscatory, such orders being designed to provide a producing schedule whereby each producer may obtain substantially the equivalent of the oil in place beneath his land and an equitable share in the natural reservoir energy of the entire field, because such a schedule provides varying tempos for production which temporarily disproportionately curtail highly productive wells to enable lesser wells.

to produce their oil before such wells are drowned out by water or their oil is drained away.

(3) In holding that the proration orders of the Railroad Commission are unreasonable, arbitrary and confiscatory in that a minimum allowable per well is set for all wells at not less than 20 barrels.

(4) In holding that the proration orders of the Railroad Commission are unreasonable, arbitrary and confiscatory in so far as they allocate the allowable production of oil on the basis of the potential producing capacity of each well in the field.

(5) In holding that the Railroad Commission must establish proration in the East Texas field so as to allocate to the respondent's lease a daily allowable production which bears to the total daily allowable for the field the same ratio that the estimated recoverable oil beneath such lease bears to the estimated recoverable oil in the entire field to the exclusion of all other relevant physical and engineering factors.

(6) In holding that the respondent, Rowan & Nichols Oil Company, discharged the burden of proving the illegality of the proration orders of the Railroad Commission attacked in this case.

(7) In failing to hold that the respondent, whose lease is more densely drilled than the average of the East Texas field, whose lease has produced and is allowed to produce more oil per acre under

the orders of the Railroad Commission than the average of the field, and whose lease shows substantially no depletion despite the large production from it over an extended period of time, is not in position to complain of the proration orders of the Railroad Commission on the ground that other producers are receiving an allegedly larger proportion of the daily allowable production from the whole field than respondent is receiving.

(8) In failing to hold that the respondent, having made no attacks on the validity of the Railroad Commission's orders for over five years, during which time approximately 17,000 wells have been drilled in the East Texas field in reliance on the validity of the orders of the Railroad Commission and during which time the orders of the Commission have remained substantially unchanged, is estopped to attack the validity of the proration orders.

## REASONS FOR GRANTING THE WRIT.

(1) The holding of the Circuit Court of Appeals in this case decides an important question seriously affecting the administration of the conservation acts not only of Texas but of other oil producing States having similar regulatory statutes and vitally affecting the property rights of the producers of approximately 26,000 wells in the East Texas field alone. This is a question which has not been but should be determined by this Court. The State

of Texas considers it of prime importance that it have a decision from this Court for the guidance of the State regulatory body in the administration of the Conservation laws of the State under the Constitution of the United States and for the protection of the property rights of the thousands of oil producers within the State.

The constitutionality of proration for the purpose of conserving oil and gas has been upheld by this Court. *Champlin Refining Company v. Corporation Commission*, 286 U. S. 210. However, this Court has not passed upon the question of what factors must be given weight in proration in order to comply with the Federal Constitution. Various methods of proration have been tried in the past and have proved impractical and have been abandoned. Previous methods have been condemned and stricken down by the Federal District Court. *People's Petroleum Producers, Inc. v. Smith*, 1 F. Supp. 361; cf. *Boxrollium Oil Co. v. Smith*, 4 F. Supp. 624; *Danciger Oil and Refining Co. v. Smith*, 4 F. Supp. 236; *MacMillan v. Railroad Commission*, 51 F. (2d) 400; *People's Petroleum Producers, Inc. v. Sterling*, 60 F. (2) 1041. Finally the potential-per-well method of allocation was sustained by the decision of the Federal District Court in *Amazon Petroleum Corp. v. Railroad Commission*, 5 F. Supp. 633, on February 12, 1934. Since then the Railroad Commission has continued its proration orders making modifications in the method in the light of new knowledge concerning the technology of oil production and new physical data collected in the constant study of con-

ervation methods. The decision in this case by the lower Courts would require a drastic change in the whole proration method seriously affecting the great investments amounting to almost two hundred million dollars which have been made in wells in the East Texas field in the past five years in reliance on the unchallenged proration policy of the Railroad Commission.

(2) The decision of the lower Federal Courts in this case is probably in conflict with the rule of property law laid down by the Supreme Court of Texas, the highest court in the State, determining the ownership of oil under proration. Under the common law in Texas the doctrine of "ownership in place" prevailed.

The Conservation statutes in Texas limit both the number of wells a producer may drill and the amount he can produce from each well. The Railroad Commission in limiting production from a common pool or reservoir must allocate the allowable production among the various producers "on a reasonable basis." The Supreme Court of Texas, while recognizing that it is "impossible to fix a standard which will give exact justice to all landowners" defines the right of a leaseowner under proration as the right to recover "a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land." *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296. See also *Gulf Land Co. v. Atlantic Refining Co.* (Texas

Supreme Court, not yet officially reported), 131 S. W. (2d) 73.

The record shows that the respondent even under the current method of proration has produced more than the average for the field per acre and nevertheless has substantially the same amount of oil as was originally in place beneath its lease, indicating favorable drainage to it of oil from beneath other lands. (R. 456). The respondent's lease will produce for many years after the leases with thinner sands have gone out of production; as other leases go out of production, the share of the total allowable assigned to respondent's wells will progressively increase. The decision of the lower Federal Courts in this case allocating allowables on a simple ratio would not only accentuate the degree of drainage to the lease of the respondent from less advantageously located producers but would give to the respondent a vested right in drainage oil, in conflict with the doctrine of ownership of oil in place and equitable withdrawals to give each producer substantially the amount of the oil in place beneath his lease. The decision below in this case would reestablish for the benefit of strategically located leases the rule of capture which proration was designed to supplant and at the same time through proration would prevent the less advantageously located producers from combatting drainage of oil from beneath their lands.

In this connection the District Court below found that at the present rate of production it would take

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28 years for the respondent to produce the estimated amount of recoverable oil beneath its tract while the field would be depleted in 11 years. (R. 72). The Circuit Court of Appeals adopted different figures, calculating that it would take 16 or 17 years to deplete the field during which time the respondent "would be permitted to produce only one-half of the oil it owns." (R. 101). Both calculations were based upon estimates of recoverable oil which were shown to have varied as much as 55%. (R. 906). Furthermore, these calculations wholly ignore the fact that respondent's lease is located high on the structure and will produce oil long after nearly all of the rest of the field has been depleted. The calculations ignore the fact that as edge wells go out of production, there will be fewer wells to divide the total field allowable, and that the daily allowable of the respondent's wells will be correspondingly increased.

(3) The theory adopted by the Courts below would result in the confiscation of the oil of other producers and in itself would be violative of the 14th Amendment of the Constitution of the United States. The respondent claims that the Railroad Commission must adopt a method of proration based on the current estimated amount of recoverable oil in place beneath each lease in the field. This theory was embraced by the District Court, which enjoined the Commission from reducing the allowable of the wells on respondent's lease below a figure which represented the ratio of the estimated recoverable oil beneath the respondent's lease to the es-

timated recoverable oil beneath the whole field. (R. 78). The Circuit Court of Appeals modified the District Court's judgment, but in effect endorsed the District Court's conclusion that the proration order must be based on the current estimate of the recoverable oil in place. (R. ~~1012~~).

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This method of proration is confiscatory in two ways: first, by eliminating the 20-barrel marginal allowable, it would so reduce the allowable of wells on small tracts as to make it impossible for the owners of such tracts to produce the oil beneath such tracts; and second, it would confiscate the property of the owners of leases in the western portion of the field by accelerating the natural eastward migration of the oil and making it impossible for such owners to produce more than a small fraction of the oil originally beneath their leases. For example, under the method proposed by the Court, a lease with ten feet of sand on the western side of the field having the same acreage as respondent's lease would be allowed to produce only about one-tenth as much oil each day as respondent's lease, which is alleged to have somewhat less than one hundred feet of sand. This would give substantial justice only if both leases produced the same length of time. But the facts are that the lease on the west side will be drowned out by the encroaching water long before respondent's lease will go off production. The result will be that the lease in the western portion of the field will produce only a fraction of its oil, while losing the rest by drainage to the wells to the east, while the respondent's lease will

recover much more than the equivalent of the recoverable oil originally in place beneath such lease. The natural advantage of the structural position of respondent's lease and all other leases similarly situated will be greatly exaggerated, and large quantities of oil will be taken away from other leases and given to respondent's lease and leases similarly situated. The effect of the decision of the Circuit Court of Appeals will be to redistribute the property rights in oil in the East Texas field, giving to some owners much more and to others much less than the equivalent of the recoverable oil originally in place beneath their leases. The decision of the Circuit Court of Appeals in this respect probably conflicts with the applicable local decisions upon this important question of local law. *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296; *Gulf Land Company v. Atlantic Refining Company* (Texas Supreme Court, not yet officially reported) 131 S. W. (2d) 73.

(4) The Courts below hold that the order of the Railroad Commission is void and in violation of the 14th Amendment to the Constitution of the United States although there was substantial evidence introduced to the effect that the order of the Railroad Commission was reasonably necessary in order to prevent the waste of oil and gas and in order to insure an equitable distribution of the production from the wells in the East Texas field. In this respect the decision is probably in conflict with *Champlin Refining Co. v. Corporation Commission*,

286 U. S. 210; *Henderson Company v. Thompson*,  
300 U. S. 258.

(5) The method of proration adopted by the Railroad Commission, and stricken down by the decisions of the lower courts, substantially gives to operators in the East Texas field, and particularly to the respondent, a reasonable opportunity to recover its fair share of the oil from the East Texas field. The method of allocation is based on a percentage of the hourly potential producing capacity of each well. The potential capacity of a well to produce is the most practical way of arriving at the total effect of the factors determining the amount of recoverable oil beneath a lease, including the factors of sand thickness, porosity, permeability, and bottom hole pressure. In other words, wells drilled on leases having thick sand, and high porosity, permeability and bottom hole pressure, will have high potentials; while wells drilled on leases having thin sand with low porosity, permeability, and bottom hole pressure, will have low potentials. Although the proration formula does not *expressly* contain a factor of sand thickness or a factor of the amount of recoverable oil beneath each well, the potential factor does directly reflect sand thickness and the amount of recoverable oil.

The proration formula does not expressly include the factor of acreage. This was held by the District Court to be in itself a sufficient ground for invalidating the order, (R. 70), and the District Court's decision was sustained by the Circuit Court

of Appeals. The decisions of both lower courts however, fail to recognize the fact that the acreage of each lease is considered by the Railroad Commission in its spacing rules, which must be construed together with its proration orders. In other words, the more acreage an operator has, the more wells he may drill and the larger the allowable which is assigned to his lease.

The respondent has certainly not been damaged by the failure of the Commission to make acreage an express factor in its proration formula. The respondent's lease, with five wells on 24.99 acres, is more densely drilled than the field as a whole. Furthermore, respondent on its own application has been granted by the Railroad Commission a permit to drill another well on its lease, which it has neglected to drill. The respondent's lease, had, up to the trial, produced 14,210 barrels per acre, while the average per acre production of the East Texas field up to that date was only 9,810 barrels. (R. 675). While certain town-site areas are more densely drilled than respondent's lease, such dense drilling is not in the vicinity of the respondent's lease, but some 15 to 20 miles away. The Circuit Court of Appeals was clearly mistaken in stating that this dense drilling was on "nearby" tracts. (R. 166). Furthermore, so long as the respondent is receiving its fair share of the oil, it cannot complain because others will receive more than their fair share. *Kuehner v. Irving Trust Co.*, 299 U. S.

(6) The respondent has long acquiesced in and benefitted by the orders of the Railroad Commission attacked. Each of its five wells was drilled as an exception to Rule 37, and by May 21, 1934, it had drilled its well No. 5, (R. 675), bringing its lease to a density of one well to 4.99 acres, a density which has not yet been reached by the average in the field, even after five years, during which approximately 15,000 wells have been drilled. The result of respondent's early and comparatively dense drilling has been that it has recovered approximately 50% more oil per acre from its lease than the average of the field. Since 1933, the orders of the Railroad Commission have been substantially unchanged, except that the factor of the percentage of the potential and the minimum allowable have been decreased and shut-down days have been introduced. During this period, approximately 17,000 oil wells have been drilled in the East Texas field. Proration orders have been promulgated on the average of about once every month, and although the respondent has occasionally protested at hearings before the Railroad Commission, it has not chosen to take appeals from such orders to the courts, as are provided by the Texas statutes. Art. 6049c, Section 8, Vernon's Annotated Civil Statutes of Texas. The holding of the Circuit Court of Appeals that the respondent, though benefitting from and acquiescing in the Railroad Commission's proration orders for over five years, is entitled to attack them now, is probably in conflict with *Life and Casualty Insurance Company of Tennessee v. McCray*.

291 U. S. 566; *Pierce Oil Corporation v. Phoenix Refining Co.*, 259 U. S. 125.

### CONCLUSION

The question involved is one of vital importance which calls for an authoritative ruling by this Court. The decision of the Court below is in substantial conflict with decisions of the highest State court, and itself raises serious constitutional doubts. For the reasons stated, therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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